THE STATE OF NEW HAMPSHIRE

SUPREME COURT

In Case No. 2006-0157, Paul Blizzard v. Elaine M. Blizzard, the court on April 19, 2007, issued the following order:

The defendant, Elaine M. Blizzard, appeals a judgment in favor of the plaintiff, Paul Blizzard, for $122,742.00. She asserts that the trial court erred by: (1) not barring the plaintiff's claim under res judicata and collateral estoppel; (2) allowing the plaintiff to amend his writ; (3) denying her motion to set aside the jury verdict; (4) allowing a judicial modification of the final property settlement; and (5) allowing the plaintiff to testify about his intent in drafting the settlement agreement. We affirm.

The defendant first argues that the plaintiff's claim was barred by res judicata and collateral estoppel. The applicability of res judicata is a question of law that we review de novo. Meier v. Town of Littleton, 154 N.H. __, __, 910 A.2d 1243, 1245 (2006). Res judicata precludes the litigation in a later case of matters actually decided, and matters that could have been litigated, in an earlier action between the same parties for the same cause of action. Id. Res judicata applies when: (1) the parties are the same or in privity with one another; (2) the same cause of action is before the court in both instances; and (3) a final judgment on the merits was rendered on the first action. Id.

The defendant argues that res judicata applies because the divorce action and the breach of contract lawsuit both involve the same cause of action: final property settlement. We have defined "cause of action" as all theories upon which relief could be claimed upon the basis of the factual transaction in question. Goffin v. Tofte, 146 N.H. 415, 417 (2001). Here, the plaintiff was not litigating a theory of recovery that he failed to raise during the first lawsuit because he could not have brought breach of contract as a counterclaim to divorce. The divorce and breach of contract lawsuits involve different factual transactions: the first is for dissolution of marital property and the second did not arise until more than ten years after the defendant filed for divorce. Cf. id. at 416-17 (res judicata did not apply to tort action because initial lawsuit for breach of contract was factually distinguishable even though both resulted from the defendant remodeling the plaintiff's house). Accordingly, the lawsuits involve different causes of action.

The defendant next argues that collateral estoppel bars the plaintiff's claim. The applicability of collateral estoppel to a given set of facts is a question of law. Farm Family Mut. Ins. Co. v. Peck, 143 N.H. 603, 605 (1999). Questions of law are reviewed de novo. Berthiaume v. McCormack, 153 N.H. 239, 244 (2006). Collateral estoppel applies when: (1) the issue subject to estoppel is identical in each action; (2) the first action resolved the issue finally on the merits; and (3) the party to be estopped appeared as a party in the first action, or was in privity with someone who did so. Stewart v. Bader, 154 N.H. __, __, 907 A.2d 931, 937 (2006).

The defendant argues that collateral estoppel bars the plaintiff's claim because the issue of final property settlement was resolved on the merits in the first action by the parties' stipulation for docket marking. The stipulation, however, is an agreement that the plaintiff would pay the defendant twenty percent of Blizzard, Inc., which was worth $1,100,000.00. The $122,742.00 that the plaintiff paid the defendant was not raised at any point during the litigation and is not mentioned in the stipulation. Accordingly, the breach of contract issue was not actually litigated or subject to final judgment.

The defendant appeals the trial court's decision to allow the plaintiff to amend his writ, claiming that the amendment changed the cause of action and called for substantively different evidence, thereby prejudicing her. The decision to grant a motion to amend rests in the sound discretion of the trial court, and we will not overturn it unless it is an unsustainable exercise of discretion. Bennett v. ITT Hartford Group, Inc., 150 N.H. 753, 760 (2004). Generally, a court should allow amendments to pleadings to correct technical defects, but need allow substantive amendments only when necessary to prevent injustice. Id. A substantive amendment that introduces an entirely new cause of action, or calls for substantially different evidence, may properly be denied. Id.

The amendment decreased the amount of money claimed, altered the description of payments and replaced "made payments" with "lent monies." The defendant argues that replacing "made payments" with "lent monies" changed the cause of action. We disagree. As stated above, "cause of action" means all theories upon which relief could be claimed upon the basis of the factual transaction in question. Goffin, 146 N.H. at 417. The defendant is correct that the plaintiff modified his theory of recovery by amending his pleading; however, both writs asserted the right to recover monies that the defendant was allegedly obligated to pay under the agreement. Accordingly, the amendment did not change the defendant's cause of action. See MacLeod v. Chalet

Susse Int'l, Inc., 119 N.H. 238, 241-44 (1979) (affirming trial court's grant of a motion to amend that altered plaintiff's theory of recovery).

The defendant argues that the amendment called for substantially different evidence. We disagree. In both writs, the plaintiff claimed that the defendant owed him money that was not part of the final settlement. Thus, all evidence revolved around the breach of contract cause of action that was present in both the original writ and the amended writ.

The defendant next argues that the trial court erred in denying her motion to set aside jury verdict because the finding that a contract was formed was conclusively against the weight of the evidence. Conclusively against the weight of the evidence means that the verdict was one no reasonable jury could return. Babb v. Clark, 150 N.H. 98, 99 (2003). We will uphold the trial court's decision on a motion to set aside the verdict unless the decision was made without evidence or the court committed an unsustainable exercise of discretion. Id.

The plaintiff gave money to the defendant that was not required by the court. The stipulation states that the plaintiff agreed to pay defendant $1.1 million for twenty percent of Blizzard, Inc. "in satisfaction of the property settlement." The stipulation does not address the $122,742.00 that the plaintiff paid the defendant. The plaintiff testified that he and the defendant agreed that she would not repay him until after she received the property settlement. Thus, there was sufficient evidence that the parties formed a contract.

The defendant next argues that the trial court erred by allowing a judicial modification of the final property settlement in the divorce decree. The breach of contract claim, however, is separate from the divorce action. The divorce action was a distribution of marital property. The breach of contract claim arose from a different factual transaction that occurred after the distribution of property had been settled by the court.

Finally, the defendant argues that the trial court committed reversible error by allowing the plaintiff to testify in violation of the parol evidence rule to the following statements: (1) "You'll get your money when I get mine"; and (2) "it's what's in the writing, but it's not what I said exactly."

Regarding the first statement, assuming that the trial court erred in admitting it, we find this error to be harmless. McIntire v. Lee, 149 N.H. 160, 167 (2003). An error is considered harmless if it is trivial, or formal, or merely academic, and was not prejudicial to the substantial rights of the party asserting it. Id. Thus, where it appears that an error

did not affect the outcome below, or where the court can see from the entire record that no injury has been done, the judgment will not be disturbed. Id.

Before the plaintiff said "You'll get your money when I get mine," he testified twice, without objection, that the defendant agreed that she would pay him back after he paid her for her share of Blizzard, Inc. Thus, any error in allowing the plaintiff to testify in violation of the parol evidence rule was harmless.

Regarding the second statement, the defendant failed to object to the testimony. Thus, the issue is waived. Klar v. Mitoulas, 145 N.H. 483, 488 (2000).

Affirmed.

DUGGAN, GALWAY and HICKS, JJ., concurred.

Eileen Fox,
Clerk